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Supreme Court of The United States

OCTOBER TERM, 1963

No. 842

DELTA ENGINEERING CORPORATION and THE TRAVELERS INSURANCE COMPANY,
Petitioners,

versus

JOSEPH RUBY SCOTT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, NATIONAL SUPPLY COMPANY and COLUMBIAN ROPE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 15th, 1963 and the denial by said court of petition for rehearing on January 2, 1964.

CITATIONS TO OPINIONS BELOW:

This case was a jury trial in which the District Court entered a judgment, but the judgment and opinion is not

reported. The opinion of the Circuit Court of Appeals is reported at 322 F 2d. 11 (1963).

JURISDICTION:

The judgment of the Circuit Court of Appeals was entered on the 15th day of August, 1963. Rehearing was denied on January 2, 1964. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED:

1) Is claim for indemnity by user of defective rope against manufacturer and supplier of rope permitted under General Maritime Law?

2) Does indemnity doctrine of maritime law apply to relationships other than stevedore - ship relationships?

3) Is negligence of user of defective rope alone sufficient to preclude indemnity claim against manufacturer and supplier of defective rope under maritime law?

4) Is reversal of judgment by Appellate Court permissable when only reason is action of trial judge in sustaining objection to cross-examination of expert on government regulations not adopted at time of accident?

5) Did trial judge commit error in failing to submit requested interrogatory to jury on negligence of supplier of defective rope and in not giving proper instructions to the jury?

6) Did trial judge err in granting remittitur to correct claim of prejudice of jury when new trial should have been granted?

STATUTES INVOLVED:

There are no express statutes involved and the case is submitted under the General Maritime Law.

STATEMENT:

The parties involved in this appeal are Joseph Ruby Scott, the plaintiff (hereinafter referred to as ("Scott"), Placid Oil Company and its insurer, Indemnity Insurance Company of North America (hereinafter referred to as "Placid", National Supply Company (hereinafter referred to as "National"), Columbian Rope Company, (hereinafter referred to as "Columbian"), Delta Engineering Corporation and insurer, The Travelers Insurance Company (hereinafter referred to as "Delta").

Joseph Ruby Scott, owner of the BARBARA MARIE, a Biloxi-type lugger; chartered it to Placid Oil Company. Scott operated the BARBARA MARIE with the assistance of one deckhand. Scott was paid a daily rate of $45.00 for the use of the vessel and Placid furnished to him his fuel and rope. Scott was not paid for any day that his lugger was in a shipyard for repairs.

On Sunday, October 18, 1959, Scott determined that the BARBARA MARIE's propeller was damaged and contacted Placid by radio to advise that the BARBARA MARIE would require repairs. Scott asked for help to repair his boat and

Placid's dispatcher requested Delta Engineering Corporation's job superintendent to assist Scott by using the Delta dragline to raise the stern of the BARBARA MARIE so that Scott could perform the repairs to the vessel himself by installing a spare tail shaft.

Placid purchased a 1-1/4" Manila rope from National Supply Company who was a distributor of the rope manufacturer, Columbian Rope Company. Placid furnished the rope new to Scott, who placed it aboard his vessel several days before the accident. Delta was constructing an oil storage battery in Lake Washington Field for Placid under a contract with Placid. In connection with this work, Delta used the dragline or a large crane which was mounted on a barge.

Scott arrived at Delta's dragline, took the new rope furnished by Placid and made a bridle to lift the stern of the BARBARA MARIE for the purpose of making repairs to the tail shaft. Then, Delta's employees arrived and connected the hook of the dragline to the rope bridle prepared by Scott and raised the stern of the BARBARA MARIE out of the water. Delta's dragline was then locked into position with all brakes set. The operator left the cab and did nothing further. Scott and his deckhand then worked under the stern of the BARBARA MARIE for approximately 40 to 45 minutes. Scott then sent his deckhand to climb aboard the BARBARA MARIE to work in the engineroom. A few minutes later, the rope bridle furnished by Scott broke and the BARBARA MARIE fell striking Scott and causing personal injuries for which he brought suit against all party defendants in this case.

The matter was submitted to the jury on the principal case with the questions of third-party claims and cross-claims being reserved to the trial judge for decision. The jury in its verdict answered 16 interrogatories and indicated that they found that Delta Engineering Company was negligent, which negligence was the proximate cause of the accident. The jury further found that the rope was defective, that the defect was a proximate cause of the accident, that the rope was manufactured by Columbian Rope Company, that it was defective when it left the custody of Columbian Rope Company, and that Columbian Rope Company should have known of the defect. The jury verdict also found Scott contributorily negligent to the extent of ten percent and awarded damages to Scott in the amount of $108,800.00.

Delta Engineering Corporation and the Columbian Rope Company filed motions for judgments N.O.V. and alternatively, for new trials. The District Court granted the motions for a new trial unless the plaintiff entered a remittitur sufficient to reduce his recovery to $75,000.00. The District Court then entered judgment in accordance with the jury verdict as reduced by the remittitur against Delta Engineering Corporation, Travelers Insurance Company, Indemnity Insurance Company of North America, and Columbian Rope Company. Under this judgment the Indemnity Insurance Company of North America was granted judgment over against Delta Engineering Corporation and the Travelers Insurance Company for indemnity in full.

Delta Engineering Corporation, Columbian Rope Company, Indemnity Insurance Company of North America, Placid Oil Company, The Travelers Insurance Company and

Joseph Ruby Scott filed appeals to the Fifth Circuit from the judgment of the District Court. The opinion of the Fifth Circuit Court of Appeals affirmed the judgment against Delta Engineering Corporation and the Travelers Insurance Company, affirmed the remittitur by the trial court, reversed the judgment as to Indemnity Insurance Company of North America and Placid Oil Company and reversed and remanded the judgment against Columbian Rope Company for a new trial. In its opinion, the Fifth Circuit indicated that the indemnity principles announced by the United States Supreme Court in the case of *Ryan Stevedoring Company vs. Pan Atlantic Steamship Corporation*, 350 U.S. 124, did not apply to the relationships of the parties involved and that additionally the negligence of Delta Engineering Corporation would preclude its right of indemnity against Placid Oil Company and Columbian Rope Company. Additionally, the Fifth Circuit in its opinion indicated that it was not necessary for it to decide if the case should be governed by *Booth Steamship Company vs. Meier & Oelhaf Company*, 262 F 2d 310 (2 Cir.) or *Italia Societa per Azioni di Navigazione vs. Oregon Steamship Company*, 310 F 2d 481 (9 Cir.) Cert. granted: U.S. Supreme Court. Further, the Fifth Circuit in its opinion stated that although Columbian did not raise any objection to the actions of the trial judge in sustaining objections to cross-examination of Delta's expert, they felt that the trial court had erred in sustaining these objections and that the judgment against Columbian should be reversed and remanded for new trial. The opinion states that the attorney for Placid should have been permitted at the trial to cross-examine the expert on comparable Official Coast Guard and other Government Standards for Manila Rigging Lines. However, the standards referred to by the court were the Department of Labor Standards which were

not in existence at the time of the accident and Coast Guard Standards for Manila Lines on Lifeboats which were clearly not applicable.

Applications for rehearing were filed in the Fifth Circuit by Delta Engineering Corporation, the Travelers Insurance Company, Joseph Ruby Scott, and Columbian Rope Company. Delta's objections to the Fifth Circuit's opinion was that the court in affirming the judgment against Delta and reversing as to Columbian had failed to follow its own decision in the case of *American Motorists Insurance Company vs. Napoli*, 166 F 2d 24 (1948 5th Cir.) wherein the same court stated that it was unjust to affirm a judgment against one joint tort feasor and remand for a new trial as to another tort feasor. Delta also contended that the opinion was incorrect in failing to follow the indemnity principles established by United States Supreme Court and in failing to follow the previous Supreme Court opinion in the case of *Minneapolis St. Paul and Sault St. Marie Railroad Company vs. Moquin*, 283 U.S. 519 (1931), wherein the Supreme Court held that it was improper for a trial judge to correct error and prejudice of a jury by a remittitur and that a new trial was the only method of correcting the defect.

The Fifth Circuit, in a per curiam opinion dated January 2, 1964, denied all applications for rehearing and reserved to the discretion of the trial court the question as to whether or not the judgment against Delta could be stayed pending the new trial against Columbian Rope Company.

REASONS FOR GRANTING THE WRIT:

I. GENERAL MARITIME LAW PERMITS CLAIM

FOR INDEMNITY BY USER OF DEFECTIVE ROPE AGAINST MANUFACTURER AND SUPPLIER OF ROPE.

II. INDEMNITY DOCTRINE UNDER THE MARITIME LAW APPLIES TO RELATIONSHIPS OTHER THAN STEVEDORE - SHIP RELATIONSHIPS.

The decision of the Court below in the instant case is directly in conflict with the indemnity principles announced by this court in the case of *Ryan Stevedoring Company vs. Pan Atlantic Steamship Corporation*, 350 U.S. 124 (1956) wherein it was held that under the General Maritime Law, a party initially cast in a judgment may recover indemnity in full from another if the other party breached its implied contractual undertakings to the party initially cast. This decision together with the decision of this court in *Weyerhaeuser Steamship Company vs. Nacirema Operating Company*, 355 U.S. 563 (1958) established that under the General Maritime Law there is a right of indemnity existing apart from tort concepts of negligence and that negligence on part of the indemnitee will not in itself preclude a right of recovery of full indemnity from the indemnitor.

In this case, the court below indicated that indemnity was not available to Delta since the traditional relationship of stevedore - shipowner, or shiprepairer - shipowner, was not present.

The sixteen interrogatories answered by the jury in this case present the basis upon which any decision must be made. The instant case presents a novel and undecided issue

of maritime law in that the relationships under which the indemnity principles announced by the Supreme Court in stevedore - ship cases are relied upon by Delta in its claim for complete indemnity from the supplier and/or manufacturer of the defective rope. The jury found that the defective rope was the proximate cause of the accident and injury to Scott. Placid knew that the rope would be used aboard the BARBARA MARIE and Placid had a contractual obligation to furnish Scott rope for use aboard his vessel. (TR. pp. 111, 579). Placid further knew, through the radio conversation on the Sunday morning, that this rope was to be used by Scott to raise the BARBARA MARIE (TR. pp 601-603). The rope would constitute in essence a latent defect since its defectiveness could not be ascertained easily by looking at the rope or by a simple test of the rope. The size of the rope suggests the manufacturer intends for it to be used in every type of marine undertaking as certainly can be expected from a large rope with a minimum breaking strength warranted by the manufacturer to be 13,500 lbs. (Tr. pp. 785, 786, 522).

It has been established in numerous cases that defective rope which is part of a vessel's equipment renders the vessel unseaworthy and the defective rope is, in itself, unseaworthy and places an absolute duty on both the owner of the vessel and of the rope. *Manich vs. Southern Steamship Company*, 321 U.S. 96 (1943); *Pettersen vs. Alaska Steamship Company*, 205 F 2d 479 (9th Cir. 1953); *Booth Steamship Company vs. Meier & Gelhaf Company*, 262 F 2d 310 (1958 2d Cir.) *Ace Tractor and Equipment Company vs. Olympic Steamship Company, Inc.*, 227 F 2d 274 (1955 9th Cir.).

The facts of this case clearly indicate that Delta raised the BARBARA MARIE and locked its crane into position. The BARBARA MARIE remained raised in position supported only by the rope for a period of 40 to 45 minutes while repair work was being performed on the vessel. Delta during this intervening period of 45 minutes did nothing further regarding the raising of the vessel or the handling of the rope in question. Everything remained as it was from the minute that the vessel was raised initially with the rope. The only thing that occurred during this intervening period of 45 minutes was that the rope broke causing the BARBARA MARIE to fall and to strike Scott. It is a fact that Placid, the suppplier of the rope to the BARBARA MARIE, was in privity of contract with Delta and Scott and Placid in fact ordered Delta to perform the lifting operation for Scott on the BARBARA MARIE as a convenience to Scott. Since Placid knew that the rope was to be used to lift the stern of the vessel, Delta contends vigorously that implied in Placid's contract with Delta was the obligation to furnish equipment free from defects. Placid breached this obligation when it furnished the defective rope, and this breach of obligation resulted in the injury to Scott. On the other hand, Delta is in a position of a third-party beneficiary to the contract between Scott and Placid and the implied contractual undertaking by Placid to furnish Scott a proper and defect-free rope. *Crumady vs. J. H. Fisser Company*, 358 U.S., 423 (1960); *Waterman Company vs. Dugan & McNamara*, 364 U. S. 421 (1960); It is submitted that Delta is entitled to indemnity under both the Ryan doctrine and under the law of indemnity applicable to product liability cases against manufacturers. The general maritime law has not required that there be privity of contract between one party and another party before in-

demnity in full be obtained from the indemnitor on breach of an obligation. See *Crumady vs. J. H. Fisser Company*, supra. Further, the indemnity principles in manufacturer's liability cases have indicated that there is no need for privity to permit the recovery of indemnity. In the case of *Hennington vs. Bloomfield Motors, Inc.*, 32 N. J. 358 (960), the New Jersey Supreme Court discussing the evolution of the field of manufacturer's warranties, states in its opinion:

> "By a parity of reasoning, it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or to a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of the parties to such that warrant the reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain."

This same doctrine has been established in the Louisiana Jurisprudence. In the case of *Lartique vs. R. J. Reynolds Tobacco Company*, 317 F 2d (5th Cir. 1963), the Fifth Circuit indicated that privity is not a necessary element in holding a manufacturer liable on his warranty. See also *Appalachian Corporation, Inc. vs. Brooklyn Coverage Company, Inc.*, 151 La. 41, 91 Southern 539, 1922; and *Edward Levy Metals, Inc. vs. New Orleans Public Belt Railroad*, 243 La. 860 148 So. 2d 580 (1963).

In this case, it is contended that under the express finding of the jury in its answers to the sixteen interrogatories that the act which caused the damage was initially the negligence of Columbian in manufacturing the defective rope and Placid in supplying the defective rope for use aboard the BARBARA MARIE. As to Placid, Delta was a beneficiary in regard to Placid's obligation to Scott to supply a good sound rope for use aboard the BARBARA MARIE. Insofar as Columbian is concerned, Delta is in the direct distributive chain of the foreseeable users of the manufactured product warranted by Columbian to meet all rigorous standards necessary for maritime users of the rope.

It is therefore submitted that under the general maritime law as announced by this Honorable Court, and products liability principles, that Delta and The Travelers, as its insurers, are entitled to full indemnity from Placid and Columbian under the theory that both Placid and Columbian breached their implied contractual undertakings to Delta.

III. NEGLIGENCE OF USERS OF DEFECTIVE ROPE CANNOT ALONE PRECLUDE INDEMNITY CLAIM AGAINST MANUFACTURER AND SUPPLIER OF DEFECTIVE ROPE UNDER GENERAL MARITIME LAW.

The opinion in the court below indicates that the fact that the jury verdict held Delta to be guilty of negligence would preclude its right of indemnity from the manufacturer of the defective rope. It is submitted on behalf of Delta that the facts of the case clearly illustrate that any

negligence on part of Delta was a passive negligence and that at the time of the accident, Delta's negligence had ceased and that the cause of the accident was the independent and intervening negligence on part of the rope manufacturer. The established facts show Delta did nothing and was requested to do nothing for a period of 45 minutes after raising the vessel, and the sole proximate cause of the accident was the failure of the defective rope. If anything that Delta did was the cause of the accident apart from the defective rope, then the accident should have occurred as the BARBARA MARIE was being raised since this was the time that the most weight and pull was put on the rope. Under these circumstances, it is submitted that there are different obligations and different duties existing between Delta and the plaintiff and Delta and the manufacturer and supplier of the defective rope in question. During the trial it was agreed by all counsel that the liability questions involved in the cross-claims in the third-party actions between the parties would be reserved to the court for a ruling by the court based on the jury's determination of facts. (TR. p. 170). The opinion below has indicated that Delta should have propounded additional questions to the jury. It is Delta's position that additional questions to the jury were not necessary under the facts, but Delta did in fact request that the negligence of Placid be specifically submitted to the jury which the trial judge, erroneously did not do. Further, additional instructions were requested by Delta and objections were made to the trial judge's instructions to the jury regarding negligence of parties without properly instructing the jury that there could be two separate proximate causes of an accident without stating similarly that there could be only one proximate cause of an accident and that negligence of one party may cease and

become remote rather than remaining as admissible negligence. (Tr. p. 858, 9)

It is submitted that the decision of the court below denying Delta indemnity because Delta was held to be negligent by the jury for its own acts is in direct conflict with this court's opinion in the case of *Weyerhaeusser Steamship Company vs. Nacirema Operating Company*, 355 U.S. 563 (1958) wherein this Court has stated clearly that the verdict for a plaintiff did not ipso facto preclude recovery of indemnity by the petitioner, since the duties owing between a shipowner and the plaintiff were not identical with those between a shipowner and an indemnitor. This Court has indicated that while the jury found an indemnitee guilty of some act of negligence, that would not in itself prevent recovery by the indemnitee of indemnity from the indemnitor.

It is submitted that the opinion in the court below is in direct conflict with this Court's opinion in the *Weyerhaeusser* case, and that the importance of this subject required that this point of law be decided by this Court in order that uniformity of jurisprudence may be had.

IV. REVERSAL OF JUDGMENT BY APPELLATE COURT IS IMPROPER WHEN BASED UPON ACTION OF TRIAL JUDGE IN SUSTAINING OBJECTION TO CROSS-EXAMINATION OF EXPERT ON GOVERNMENT REGULATIONS NOT ADOPTED AT THE TIME OF THE ACCIDENT.

The Court below reversed the judgment as to Columbian Rope Company solely and only on the grounds that

there was an improper abuse by the trial court in limiting the cross-examination of an expert witness. This issue was not raised on appeal by Columbian nor did this issue involve Columbian in the trial of the case. We refer the Court to the transcript (pages 525 through 532) regarding this issue. Columbian's attorney did not ask the objected to question of Mr. Lacourt, the Delta expert, concerning the rope involved. The questions were asked by Placid's attorney. In fact, Columbian did not specify as error to the Court below the said refusal of the trial court to permit the questions under cross-examination, nor did Columbian at any time raise this issue before the Court below. Notwithstanding this objection by Columbian's own attorney, a mere reading of the transcript clearly reflects that the attempt by Placid's attorney to cross-examine the expert on "existing laws" regarding this area was specifically answered by the expert himself and we quote from page 531 of the transcript.

> "*The Court:* Mr. Witness, is the situation with reference to the use of the rope for stevedores and longshoremen an equivalent use to what has been described here to you in court?"
>
> *The Witness:* No, sir, I say that it is not a similar condition."
>
> *The Court:* And will you state why, sir?
>
> *The Witness:* The rope was actually placed around the vessel and fitted as a fixed object, and the load was applied on the vessel to merely raise an object. So the rope was subjected to constant flexing and

bending and round pulleys, and I would say that the factor of safety of that operation would not necessarily be five, or that the maximum working strength of the rope should have been limited to 20% of its breaking strength."

The Court below in its opinion states that the counsel for Placid and others undertook to cross-examine the expert, on comparable official Coast Guard and other government standards for manila riggings, etc., but that the trial judge, without giving counsel the opportunity to factually develop sufficient information on which reliable rulings could then be made, cut this short with the admonition that this could be proven by their own witnesses. The Court below then cites in its opinion the comparable Coast Guard and other government standards for rigging, 46 CFR Sections 33.10-11; 91.37-25; and 29 CFR, Section 9.62. These sections relied upon the Court below as the *only basis* to reverse the judgment against Columbian, concerned Coast Guard regulations regarding ropes used on lifeboats aboard vessels and the Department of Labor Regulations for longshore operations which were not even adopted and in effect at the time the accident took place and were certainly not proper standards upon which to interrogate a witness on this accident since they were not in existence at the time of the accident. Even further than that, the reason that the regulations are not proper is that the witness had stated previously again and again in response to the same question that the difference between longshore operations aboard a ship and the operations conducted at this time is that longshoremen used booms with pulleys and the ropes run through the pulleys, whereas in this case, there was a straight pull on the rope and the rope was not bent in any size, shape or form, by

which the strength of the rope would be weakened, (Tr. pp. 529-532 and 547-8, 553)

It is respectfully submitted that the opinion of the Court below is entirely in error in reversing the judgment as to Columbian and affirming the judgment as to Delta.

V. REVERSAL OF JUDGMENT AGAINST ONE JOINT TORT FEASOR WITH REMAND FOR A NEW TRIAL IS INCONSISTENT AND UNJUST AS TO REMAINING TORT FEASOR SINCE THE JUDGMENT IS THEN PERMITTED TO BE EXECUTED AGAINST ONE JOINT TORT FEASOR ALTHOUGH CASE INVOLVES THE LIABILITY OF BOTH JOINT TORT FEASORS.

If the judgment of the lower court is entered, then the operation of this judgment will frustrate completely the opinion of the Court below taken as a whole. The judgment will permit the plaintiff to collect the entire amount of the judgment immediately from Delta and the new trial anticipated and ordered by the lower court would be moot. On rehearing, the Fifth Circuit in its per curiam opinion permitted the discretion of the trial judge to be exercised as to the staying of this judgment. Notwithstanding this, it is submitted that this exact situation has been previously passed on by the Fifth Circuit and that that court in its own opinion stated previously that to place a party in this deleminia is inequitable and unjust. In the case of *American Motorists Insurance Company vs. Napoli*, 166 F 2d 24 (5th Cir.) 1948, the Fifth Circuit in its opinion stated as follows:

"The judgment being insolido against both defendants, it would be manifestly unjust to reverse the judgment as to one defendant alone, leaving the other defendant solely liable for the full amount of the damages assessed."

The Fifth Circuit has disregarded completely the prior jurisprudence as announced by its own decision and has left the matter of a stay of execution within the discretion of the trial judge. We submit that this conflict leaves a serious question of law unsettled until it is decided by the Supreme Court.

VI. TRIAL JUDGE ERRED IN FAILING TO SUBMIT REQUESTED INTERROGATORY TO JURY REGARDING NEGLIGENCE OF SUPPLIER OF DEFECTIVE ROPE.

The decision of the Court below in the instant case is clearly in conflict with the Second Circuit's decision in the case of *Booth Steamship Company vs. Meier & Oelhaf Company*, 262 F 2d 310 (2 Cir. 1958) and this type of conflict is presently before this court in the case of *Italia Societa per Azioni di Navigazione vs. Oregon Stevedoring Company*, 310 F 2d 481 (9th Cir.) Cert. granted and now pending. It is submitted that under the opinion in the Booth case, the supplier of defective equipment to a vessel is responsible and may be held guilty of negligence. Accordingly, a request was made to the trial court and an objection was made when the trial judge refused to submit on interrogatory to the jury to ascertain if Placid in this case was guilty of negligence. The failure of the Trial Judge to submit this question to the jury should be reviewed by this Court.

VII. TRIAL JUDGE ERRED IN GRANTING A REMITTITUR TO CORRECT CLAIM OF PREJUDICE AND PASSION OF JURY IN RENDERING ITS VERDICT, WHEN A NEW TRIAL SHOULD HAVE BEEN GRANTED.

The jury in the present case consisted of eight women and four men. Throughout the trial there were appeals to the passion and prejudice of this jury. In final argument, and rebuttal, counsel for Joseph Ruby Scott invaded the province of the court and attempted to instruct and was permitted by the court to instruct the jury on each answer to each individual interrogatory to be later submitted to the jury by the court. At page 100 and 101 of the supplemental transcript, Scott's attorney stated to the jury the manner in which each and every interrogatory *must* be answered by them to give Scott a recovery in this case. Delta's attorney objected that it was an improper argument and further improper rebuttal, and although the District Court apparently agreed, it refused to give the jury precautionary instructions and permitted counsel "because he was finishing his rebuttal" to continue to commit and compound the same error. (Supplemental transcript pages 100-102). The District Court, notwithstanding the aforementioned pleas to passion and prejudice, and the continued use throughout the trial by Scott's attorney of a model skeleton, *refused* and did not give Delta's requested charge No. 6 which is a standard charge instructing the jury not to sympathize with any party merely because of an injury and instructing them that the verdict cannot be governed by passion, prejudice, sympathy or any motive whatsoever, except a fair and impartial consideration of the evidence. (Tr.

pp. 891, 858). Delta specifically objected to the court's refusal to give this necessary and pertinent sympathy charge.

Additionally, following the reception by the court of the jury's verdict, Delta within proper time filed a motion for a judgment N.O.V. and alternately, for a new trial on the grounds that the jury verdict was completely contrary to the law and the facts and was governed by passion and prejudice and sympathy on the part of the jury. The court entered a minute entry on April 10th, 1962, granting Delta, the Travelers and Columbian a new trial, unless the plaintiff within 10 days entered a remittitur reducing the amount of the recovery to $75,000.00. Scott then entered a remittitur and the new trial was "not granted" in the lower court.

The United States Supreme Court in the case of *Minneapolis St. Paul & Sault St. Marie Railroad Company vs. Moquin*, 283 U.S. 519, 75 L.Ed. 1243 (1931) held in its opinion:

> A new trial was ordered, unless the respondent should file in the trial court, a writing remitting a portion of the verdict. Such a remittitur was filed and thereupon the trial court entered judgment for the remained . . . It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict . . . In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously, such means may be as effec-

> tive to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

See also, *National Surety Company vs. Sheehan*, 61 F 2d 197 (6th Cir. 1932).

It is respectfully submitted, therefore, that the opinion below affirming the remittitur and disregarding the express opinion of the United States Supreme Court should be reviewed. It is submitted that the District Court must have felt that the verdict in this matter by the jury was excessive under the circumstances and a "run-away and prejudiced-sounding verdict", otherwise the District Court would not have entered a remittitur of approximately $23,000.00. Under these circumstances, the prejudice to Delta and Travelers could not have occurred merely in the amount of the verdict, but also possibly in the *granting* of the verdict by the jury in the first place. The Supreme Court has clearly held under those circumstances that the only way to cure the defect is by the granting of a new trial, therefore, it is respectfully submitted that the opinions of the Circuit Court and the District Court are not in harmony with the express opinions of this court and constitute error on part of the lower courts.

CONCLUSION:

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed into the United States Mail with adequate postage affixed thereto.

ERNEST A. CARRERE, JR.

APPENDIX A-1

JUDGMENT

United States District Court
Eastern District of Louisiana
New Orleans Division

Joseph Ruby Scott,

Plaintiff,

versus

Civil Action
No. 10224-B

Delta Engineering Corporation, Travelers Insurance Company, Indemnity Insurance Company of North America, National Supply Company, and Columbian Rope Company,

Defendants.

This case having come on for trial before the court sitting with a jury, and the court having considered the verdict of the jury and the pleadings and briefs as filed by the parties, and the court being of the opinion that the plaintiff, Joseph Ruby Scott, is entitled to recover against defendants, Delta Engineering Corporation, Travelers Insurance Company, Indemnity Insurance Company of North America and Columbian Rope Company, and that Indemnity Insurance Company of North America is entitled to judgment over against Delta Engineering Corporation and Travelers Insurance Company;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff and against the defendants, Delta Engineering Corporation, Travelers Insurance Company, Indemnity Insurance Company of North America and Columbian Rope Company, in the full amount of Ninety-seven Thousand, Nine Hundred and Twenty Dollars ($97,920.00), with interest and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment over in favor of Indemnity Insurance Company of North America on its cross-claim against Delta Engineering Corporation and Travelers Insurance Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cross-claim of Delta Engineering Corporation and Travelers Insurance Company against National Supply Company, Columbian Rope Company and Indemnity Insurance Company of North America, be, and the same is hereby, DISMISSED with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of Delta Engineering Corporation and Travelers Insurance Company against Placid Oil Company be, and the same is hereby, DISMISSED with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the counterclaim of Placid Oil Company against Delta Engineering Corporation and Travelers Insurance Company be, and the same is hereby, DISMISSED with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cross-claim of National Supply Company against Columbian Rope Company be, and the same is hereby, DISMISSED with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's claim against National Supply Company be, and the same is hereby, DISMISSED with costs.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
April 10, 1962

REASONS

The joint liability of Delta Engineering Company and Columbian Rope Company arises from the jury verdict of January 25, 1962, finding that Scott's injuries were proximately caused by the joint negligence of Delta and Columbian. Placid Oil Company, as time charterer of Scott's boat and in accordance with that charter, supplied the defective rope to Scott. That defect breached Placid's warranty of merchantable quality. *Henningsen v. Bloomfield Motors*, 32 N.J. 353, 161 A. 2d 69; *Ryan v. Progressive Grocery Stores*, 265 N.Y. 386, 175 N.E. 105; Prosser, *Torts*, § 83, p. 495; Frumen & Friedman, *Products Liability*, §19 et seq., and seaworthiness, *Manich v. Southern S.S. Co.*, 321 U.S. 95; see *Booth Steamship Co. v. Meier-Oelhaf Co.*, 2 Cir., 262 F. 2d 310; *Ace Tractor & Equipment Co. v. Olympic S.S. Co., Inc.*, 9 Cir., 237 F. 2d 274; *Shamrock Towing Co. v. Fitcher Steel Co.*, 2 Cir., 155 F. 2d 69. Consequently, Placid's insurer, In-

demnity Insurance Company of North America, is jointly liable to Scott with Delta and Columbian.

Indemnity Insurance Company cross-claims against Delta Engineering Corporation and its insurer, Travelers Insurance Company, for the failure to perform workmanlike service. Since Delta has been found negligent, such a claim is cognizable and Indemnity Insurance Company may be fully indemnified against Delta and Travelers, *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563; *Ryan Stevedoring Co. v. Pan Atlantic S.S. Co.*, 350 U.S. 563, notwithstanding the fact that Placid unknowingly supplied defective rope. *Waterman Co. v. Dugan & McNamara*, 364 U.S. 421; *Crumady v. The J. H. Fisser*, 356 U.S. 422.

While the requirement of privity of contract in warranty seems in the final stages of decay, *Dandy Knitwear, Inc. v. American Cyanamid Company*, — N.Y. —, No. 315, March 22, 1962; Prosser, *The Assault on the Citadel*, 69 Yale L.J. 1099 (1960), and has alway been inappropriate where seaworthiness was concerned, *Waterman Co. v. Dugan & McNamara*, supra; *Crumady v. The J. H. Fisser*, supra; *Sans Shipping Co. v. Biereeki*, 326 U.S. 89, National Supply Company is not liable to Scott. Its custody of the rope was only momentary, *Booth Steamship Co. v. Meier-Oelhaf Co.*, supra, 314, and it was, at best, merely a conduit through which a sealed package was transferred from Columbian Rope Company to Placid Oil Company.

Delta's cross-claim against National and Columbian is unavailing. Delta's liability inheres, not in the defective rope, but in its own separate and distinct acts of negligence which were found by the jury to be a proximate cause of the accident.

APPENDIX A-2

In The
United States Court Of Appeals
For The Fifth Circuit

No. 19861

Delta Engineering Corporation and The Travelers Insurance Company,
Appellants.

versus

Joseph Ruby Scott, et al.,
Appellees.

Columbian Rope Company,
Appellant.

versus

Joseph Ruby Scott,
Appellee.

Indemnity Insurance Company of North America,
Appellant.

versus

Joseph Ruby Scott,
Appellee.

Joseph Ruby Scott,

Appellant,

versus

Delta Engineering Corporation, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(August 15, 1963.)

Before CAMERON and BROWN, Circuit Judges, and WHITEHURST, District Judge.

BROWN, Circuit Judge: In this five-sided Donnybrook tried as a jury civil action thanks in part to the Louisiana Direct Action Statute which gave the Court jurisdiction over some Louisiana citizens to determine rights under a mixture of state and federal maritime principles, none are happy and all appeal. This comes about from the injury received by Plaintiff Scott when his workboat fell on him as a result of a rope sling parting during the time the vessel was suspended by a dragline crane operated by Delta. This complexity, however, is more apparent than real and not more than a single new significant legal question is presented. As for the balance, it all washed out with the jury verdict so we once again serve the thera-

peutic function of giving heed to arguments which had to prevail elsewhere; but did not.[1]

Scott was the owner of the Lugger BARBARA MARIE, about 45 feet long. She was under an oral, informal, daily time charter to Placid. Under the charter, Placid, the charterer, was to supply fuel, lube oil and all rope needed for lines and the like. Just the day before the accident, Placid furnished a coil of brand new 1-1/4 inch manila rope manufactured by Columbian and sold by its distributor National Supply. And thereby hangs this tale if not the BARBARA MARIE.

Scott reported to Placid that repairs were required. To avoid a two-day lay up which would take the needed vessel out of charterer's service, Placid requested Delta to hoist the vessel's stern by use of Delta dragline crane mounted on a barge. Delta was engaged in pipeline construction work for Placid in this amphibious oilfield. For this service, it was to be, and was, paid its regular contract rate. A bridle, made by doubling up a length of the new Columbian rope, was passed under the lugger's stern and made fast by a shackle to the wire rope fall of the crane. With the lugger's bow still afloat, the stern was hoisted so that Scott could work under the vessel from a floating pontoon. After being suspended in this way about

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[1]The cast of characters and their respective insurers is:
Joseph Ruby Scott, plaintiff
Delta Engineering Corporation (the Travelers Insurance Company)
Columbian Rope Company
Placid Oil Company (Indemnity Insurance Company of North America)
National Supply Company

45 minutes, the vessel fell on Scott when the new rope parted about a foot below the knot at the apex of the bridle.

The jury under a submission on a general charge, but with special interrogatories (F.R.Civ.P. 49) and without which all of the legal questions would have been perpetually sealed behind the impenetrable mystery of a general verdict,[2] reached these decisive conclusions. It found Delta negligent, the rope defective from a defect which existed when the rope left the custody of Columbian who either knew or should have known of the detect. It also found that the defect in the rope existed while it was in the custody of National and of Placid, but that neither National nor Placid knew or should have known of the defect. The Plaintiff Scott was found to have been 10% negligent and total damages were fixed at $108,800. There were, of course, appropriate findings of proximate cause.

The Judgment.

After reduci the award of damages by 10%, the Court entered ju ment for Scott against Delta, Columbian, and Placid.[3] It allowed recovery over by Placid against Delta and simultaneously denied Delta's claim over against Placid and Columbian.[4] Subsequently, on motions

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[2]See Tugwell v. A. F. Klaveness & Co., 5 Cir., 1963, . . . F.2d . . ., ... AMC . . . ; especially see note 2 [#20278, July 3, 1963]

[3]National Supply was dismissed, and we affirm this without necessity of any discussion.

[4]In the unreported reasons for judgment, the Court allowed recovery against Placid despite the jury finding that it neither knew nor should have known of the defect in the rope supplied by it

for new trial it granted a new trial unless the Plaintiff Scott filed a remittitur reducing recovery to $75,000.

Plaintiff Scott's Appeal.

Scott seeks to set aside the remittitur and reinstate the judgment to $98,200. All defendants within the risk of judgment oppose this on two grounds. The first is that voluntary acquiescence in the remittitur forecloses further review. The second seeks to justify the Court's action on the intrinsic merits. We need not pass expressly on the first. We would assume, without deciding, that until such time as a plaintiff has actually obtained the fruits of a judgment (which is not the case thus far here), he is free to challenge the legal correctness of the Court-enforced re-

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to Scott. The Judge had this to say: "Placid Oil Company, as time charterer of Scott's boat and in accordance with that charter, supplied the defective rope to Scott. That defect breached Placid's warranty of merchantable quality, Henningsen v. Bloomfield Motors, 23 N. J. 356, 161 A.2d 69; Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105; Prosser, Torts, §83, p. 495; Frumen & Friedman, Products Liability, §19 et seq., and seaworthiness, Manich v. Southern S.S. Co., 321 U.S. 96; See Booth Steamship Co. v. Meier-Oelhaf Co., 2 Cir., 262 F.2d 310; Ace Tractor & Equipment Co. v. Olympic S.S. Co., Inc., 9 Cir., 227 F.2d 274; Shamrock Towing Co. v. Fitcher Steel Co., 2 Cir., 155 F.2d 69. Consequently, [Placid] • • • is jointly liable to Scott with Delta and Columbian."

Placid was, however, given judgment over against Delta on the ground of "the failure [of Delta] to perform workmanlike service" based on and citing Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed.2d 491, 1958 AMC 501, and the limitless progeny of Ryan Stevedoring Co. v. Pan Atlantic S.S. Co., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, 1956 AMC 9. Delta's cross claim against Columbian was denied since "Delta's liability inheres, not in the defective rope, but in its own separate and distinct acts of negligence which were found by the jury to be a proximate cause of the accident."

mittitur. It would be a strange rule that would keep a plaintiff from challenging the legal correctness of any action having such portentous consequences. But allowing the plaintiff to make the challenge, the burden is a heavy one and the scope of appellate review correspondingly narrow. Great latitude is allowed to a United States District Judge to grant a new trial where in the discretion of the Judge it is needed to prevent an injustice. A clear abuse of that discretion or some extraordinary legal situation must be demonstrated to obtain relief from such action.[5]

Assuming that the Plaintiff Scott is free to assert the attack, we are clear that on the intrinsic merits no abuse of discretion has been shown. This able, experienced trial Judge, on top of the case at all times, was thoroughly aware of the detailed evidence bearing upon the nature and extent of the injuries, the monetary damages sustained, and related factors. At the same time, however, we also reject the attack made by Delta. Reducing the amount of the award to this sum was not the equivalent of a determination by the Court that the verdict was the product of passion and prejudice. What, and all that it was, was an implied finding that on the evidence, the jury had awarded too much. The figure fixed was the outside figure which the Court thought could be proved.

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[5]See Kirby Lumber Corp. v. Laird, 5 Cir., 1956, 231 F.2d 812, 816; Whiteman v. Pitrie, 5 Cir., 1955, 220 F.2d 914, 918; Marsh v. Illinois Central R.R., 5 Cir., 1949, 175 F.2d 498, 500; Missouri Pacific R.R. v. Fustier, 5 Cir., 1958, 256 F.2d 273; Auto-Owners v. State Farm Mutual Auto. Ins. Co., 5 Cir., 1958, 252 F.2d 96; Fn... v. American Fire & Casualty Co., 5 Cir., 1953, 207 F.2d 113, cert. denied, 1954, 347 U.S. 912, 74 S.Ct. 476, 98 L.Ed. 1069, following the reversal and remand, 1951, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702, of our original decision, 1950, 181 F.2d 845.

Delta's Appeal.

In its brief Delta levels a charge of sixteen separate errors, only a few of which warrant discussion. The most basic one is that the evidence was insufficient as a matter of law. We think the trial Judge was correct in submitting this case to the jury, and Delta is bound by the jury findings.

Delta's effort to picture itself as one extending gratuitous help to Scott as a man in need hardly bears analysis. Delta was requested by Placid to do the work. Placid expected to, and did, pay Delta's charges for the work. It was therefore, as a minimum, required to exercise reasonable care in the execution of this contractual undertaking.

There was ample evidence which the jury could, and presumably did, credit on which to base a finding of negligence. And this evidence did not confine negligence to the defective rope, as such. One major factual controversy between Scott and Delta's superintendent was whether Scott requested and Delta declined to put the stern of the vessel on the bank in order to eliminate the very hazard of the vessel falling. And very much in evidence was the underlying question whether this rope sling should have been used, especially in view of accepted safety factors when applied to maximum breaking strength.

This came close, of course, to Scott's own negligence in acquiescing in this method and working under these hazards. But there again there was evidence that permitted the jury to find that because of Delta's superior knowledge in problems of rigging, Scott had a right to rely on

the experienced judgment of Delta's representative. And, of course, Delta's efforts to transmute the 10% contributory negligence finding into a complete bar under Louisiana principles is at least ten years too late as our opinion in *Southport Transit Co. v. Avondale Marine Ways*, 5 Cir., 1956, 234 F.2d 947, 949, 1956 AMC 1498, recognized and as to which all doubt has now been dispelled by *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 629, 79 S.Ct. 406, 3 L.Ed.2d 550, 1959 AMC 597.

As to the other specifications, little need be said. Considering the remittitur discussed above, Delta has not demonstrated, as claimed, that the jury verdict was motivated by passion and prejudice. With the medical testimony, Scott's own complaint of pain and inability to work, expenses incurred and employment opportunities diminished, there was adequate basis for the award. Considering the charge as a whole, we do not think it subject to any of the exceptions now urged by Delta. So far as procedural errors in the handling of evidence, opening statement of counsel, argument of counsel, and the like, if any of these were an error, it was slight and of no significant consequence.

This leaves only the contention that the Court erred in allowing Placid to recover indemnity over against Delta and, conversely, in not allowing Delta to recover from Placid. So far as Delta's right of recovery against Columbian is concerned, we think the Judge's indicated basis amply sustained denial of this claim over. This cross claim was unavailing, he said, because "Delta's liability inheres, not in the defective rope, but in its own separate and distinct acts of negligence which were found by the jury to be a proxi-

mate cause of the accident." (See note 4, *supra*) Columbian was, at most, then a joint tort-feasor from whom contribution, not indemnity, might be available. See *Travelers Ins. Co. v. Busy Electric Co.*, 5 Cir., 1961, 294 F.2d 139; *cf. Halliburton Co. v. Norton Drilling Co.*, 5 Cir., 1962, 302 F.2d 431, on rehearing, 313 F.2d 380. Neither by written request nor by timely exception to the Court's charge[6] did Delta specifically request the submission of issues pinpointing its own negligence so as to distinguish between general negligence and that specifically connected with the defective rope as such. This amounted to a waiver of a jury trial on these issues and paved the way for an implied finding by the Court in support of the judgment entered by it. F.R.Civ.P. 49.[7]

As to Placid's judgment over against Delta, little need be said at this point. This judgment-over flowed from the District Court's judgment holding Placid liable directly to the Plaintiff Scott. For reasons we later discuss we reject this conclusion and find that under these circumstances there was no liability of Placid to Scott, and hence there is no need for Placid to have this relief.

This does, however, leave the reverse contention open for our review. But we think the Court was equally correct in denying Delta a right over against Placid. Considering the nature of the jury findings — and the absence of any other

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[6]These matters were raised for the first time by Delta in its supplemental motion filed seven days after entry of the judgment.

[7]"If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." F.R.Civ.P. 49.

specially requested issues by Delta on this point.— Delta fails to establish as a factual matter any "warranty" or "representation" by Placid that the rope either was (a) necessarily to be used in connection with the requested hoisting of the vessel or (b) that it was reasonably fit for that task. Whatever might be the reaches of the theories following in the wake of *Ryan* where traditional relationships of stevedore-shipowner or repairman-shipowner are involved, the extraordinary relation existing here between Placid and Delta does not automatically invoke like consequences. If the representations were impliedly made, it was a matter of proof and a translation of that proof into an effective, favorable jury resolution of it. If there was evidence, it was not conclusive and the jury's undisclosed determination is now deemed to be against Delta (see note 7, *supra*).

Placid's Appeal.

The District Court held that Placid was jointly liable with Delta and Columbian to Plaintiff Scott for the full amount of the judgment. The theory was that Placid breached an implied warranty of merchantable quality and seaworthiness. See note 4, *supra*. It facilitates matters to discuss separately the normal idea of warranty arising from a sale and those arising under peculiar and recent maritime principles.

Apart from the extraordinary liabilities which the rapidly expanding *Ryan* principle of maritime law might generate, we do not think that the usual warranties of a manufacturer, seller, or supplier of goods attaches to Placid *vis-a-vis* Scott. The arrangement was essentially one of bearing costs. For a daily specified hire plus the cost of fuel,

lube oil, and rope lines, the BARBARA MARIE was chartered to Placid on a time basis. There is nothing suggesting that Scott was relying upon any peculiar or special skill or knowledge on the part of Placid as to these things. We can assume that where a charterer pursuant to the terms of the charter undertakes to furnish the things called for, it must exercise due care. *Cf. Park S.S. Co. v. Cities Service Oil Co.*, 2 Cir., 1951, 188 F.2d 804, 1951 AMC 851, cert. denied, 342 U.S. 862, 72 S.Ct. 87, 96 L.Ed. 648. But here the jury expressly found that Placid did not know nor should it have known of the defect in this rope.

Nor do we think that as to this relationship of time charterer and owner, there is a sufficient analogy to the traditional relationship of stevedore-shipowner, ship repairer-shipowner, to invoke the doctrines now developing from *Ryan*. This spares us the necessity of making a choice between the Second Circuit's decision in *Booth S.S. Co. v. Meier & Oelhaf Co.*, 2 Cir., 1958, 262 F.2d 310, 1959 AMC 1974, and *Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co.*, 9 Cir., 1962, 310 F.2d 481, 1963 AMC 79, certiorari granted and now pending, U.S. , S. Ct. , L.Ed.2d [31 L.W. 3335]. As each of these two opinions reveals, the problem there dealt with arose from the *Ryan* concept of "the warranty of workmanlike service." The question posed, then, was: in a relationship giving rise to the *Ryan* warranty of workmanlike service, does the warranty comprehend the absolute suitability of appliances or equipment furnished by such person in the performance of that work? The answers were divergent.

While the maritime jurisprudence affords a fresh example that from little acorns big oaks may grow, we would doubt very much that the *Ryan* notion is to carry over to

every conceivable relationship which might exist between a ship and a third party. Particularly would that be true as between a shipowner and a time charterer. By its nature what is obtained is *service*, not possession and control of the vessel. The latter is characteristic of a bareboat, demise, charter under which the temporary user takes over operational control to become, as the nautical rubric states it, one who mans, victuals and supplies the ship. Cf. 46 USCA §181 et seq., especially §186.

Conversant as is that distinguished admiralty court with the intricate problems of maritime commerce, we would have much doubt that the Second Circuit by *Booth* intended to revolutionize the whole notion of the nonoperational status of a time charterer.[8] As

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[8]See for example Government Form New York Produce Exchange time charter, appendix D, p. 287, Poor, Charter Parties & Ocean Bills of Lading (4th Ed. 1954) which charters the vessel on the following conditions:

"1. That the Owners shall provide and pay for all provisions, wages * * * of the crew; shall pay for the insurance * * * deck, engine room and other necessary stores * * *.

"2. That the Charterers shall *provide* and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, * * * and all other usual expenses except those before stated * * *."

Discussing these obligations of the charterer to *provide* and pay for such things as pilotage, towage, bunkers, the text §7, p. 22, 25, states that though a pilot is provided by charterer "nevertheless it is the owner and not the charterer who is liable for his negligence in navigating." And for similar reasons "the charterer is not liable for the negligence of the tugs which he has employed to dock the vessel."

Under the new found doctrine would the time charterer warrant the absolute seaworthiness of a harbor tug? The tugworthiness of the tug's performance? A local pilot? Cf. Boudoin v. Lykes Bros. S.S. Co., 1953, 348 U.S. 336, 75 S.Ct. 382, 99 L. Ed. 354, 1954 AMC 2231; McConville v. Florida Towing Corp., 5 Cir., 1963, F.2d AMC [No. 20195, July 18, 1963].

Judge Lumbard makes clear for that Court in *Drago v. A/S Inger*, 2 Cir., 1962, 305 F.2d 139, 1962 AMC 1377, *Booth* does not remotely suggest a universal warranty of absolute suitability or seaworthiness as to everything and everybody on every ship under every circumstance.

The District Court was wrong, therefore, in allowing recovery by Scott against Placid for a non-negligent breach of these asserted warranties. Scott's claim against Placid must be dismissed and for like reasons, Delta's claim over against Placid must also fail.

Columbian's Appeal.

Columbian levels seven grounds of error to reverse the judgment against it. We do not think there is any real basis for the criticism of the Court's charge for the jury to approach the "subject empirically." Taken as a whole, this meant the jury was to use its common sense in the light of the evidence showing the breaking strength, the safety factors, the actual weight of the load and the circumstances existing at the time the rope parted. Nor is there any basis for criticizing the frequent reference to the rope in the 16 special interrogatories. The rope broke. That is what it is all about. There was no way to conceal this operative fact, and in any event the Court was at pains to reassure the jury by appropriate precautionary instruction that no inference was to be drawn from such repetition. Nor are other objections to the Court's charge of any real merit.

The real serious question, however, is whether there is any evidence to sustain the verdict of the jury which very plainly found that the rope was defective, and that Columbian knew or ought to have known of the defect at the time the rope left its custody and control.

While the matter is not free from considerable difficulty, we have concluded that the evidence was not sufficient to sustain the finding that the rope was defective. It was error for the Court not to have granted the instructed verdict.

But in so holding, we do not think this is a case for reversal with directions to render judgment for Columbian. The maximum is a reversal and remand for another trial. *Gulf Oil Corp. v. Wright*, 5 Cir., 1956, 236 F.2d 46, 53. Much of our difficulty in the case on this score has come from the rather unusual way in which the experts were examined on this phase. When an effort was made on cross examination to elicit testimony on the opinion experts, such as Lecourt, would have as to the safety factor in contrast to the breaking strength, the Court responding to objections in effect required counsel to defer this proof to their own witnesses. No objection to this course is carried forward here as such, but it goes to the very sufficiency of the evidence. Lecourt, for example, is the only witness who comes close to stating that a safety factor of slightly more than one (over breaking strength) would be adequate for a steady lift. Counsel for Placid and others undertook to cross examine him on comparable official Coast Guard and other

Government standards* for manila rigging lines, etc. But without giving counsel the opportunity of factually developing sufficient information on which reliable rulings could then be made, this examination was cut short with the admonition that it could be proved by their own witnesses.

Of course this is a complete frustration of a major purpose of cross examination. Nowhere is the consequence better proved than here. For example, on Lecourt's opinion not subjected to this searching examination, he gives one figure. Utilizing the opportunity accorded to them by the Court, the other parties produced experts later on. Their testimony was at substantial variance. But on normal principles, that meant that both for the jury and for us, there was a factual controversy which it was the jury's function to resolve. What counsel were entitled to was a searching cross examination of the witness whose testimony now afford the principal basis for affirming the judgment. *Degelos v. Fidelity & Casualty Co.*, 5 Cir., 1963, 313 F.2d 809.

The breaking strength of this rope was stated to be approximately 13,500 pounds. On Lecourt's calculations the weight on the rope sling ran in the neighborhood of 10,000 to 12,000 pounds, but being a double sling this load would be divided. This was well under the manufacturer's breaking strength, but there is yet no evidence in this record that would authorize a finding that the breaking strength and the working

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*See 46 C.F.R. §§33.10-11; 91.37-25; 29 C.F.R. §9.62

load are synonymous. Indeed, the contrary is clear, and the only question is as to the safety factor. The total record indicated from other sources, including the Coast Guard Regulations which would ordinarily be at least some evidence of due care and prudence,[10] that the safety factor was something much more than 1 to 1, some running as high as 5 to 1.

Of course had the Court permitted Lecourt to be fully examined and had he adhered to opinions expressed from time to time that for a steady pull, the safety factor of one plus is adequate, we would be faced with quite a different proposition. Here we have to test the sufficiency of his evidence in the light of (a) an undue restriction on cross examination to test his professional opinion, and (b) overwhelming testimony to the contrary from other witnesses. In that posture we are not able to say that the evidence permitted a jury to hold that the use of this rope for this lift was within the reasonable capabilities of the rope so that its failure under such use would permit an inference of defectiveness. In other words, the parting of a line under a weight merely within its tensile breaking strength may perhaps not permit an inference of defectiveness unless there is more, the more being the accepted safety factor.

Having said this, we would sound the caveat again

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[10]Cf. Pure Oil Co. v. Snipes, 5 Cir., 1961, 293 F.2d 60, 66, 1961 AMC 1651; Schlichter v. Port Arthur Towing Co., 5 Cir., 1961, 288 F.2d 801, 804, 1961 AMC 1164, cert. denied, 368 U.S. 828, 82 S.Ct. 50, 7 L.Ed.2d 32; Davis v. Parkhill-Goodloe Co., 5 Cir., 1962, 302 F.2d 489, 493, 1962 AMC 1720.

that as the case goes back for trial on the limited issues of liability only (not damages), and as to Scott versus Columbian alone,[11] the sufficiency of the evidence is to be measured initially by the trial Judge on the record then and there made. We know for a certainty that the record will not be the same as it is here. It will be a fruitless and artificial thing to match word by word, question by question, answer by answer as to what that record develops in contrast to the present one. Whether that record as then made is or is not legally sufficient is a decision committed in the first place to the trial Judge, and only thereafter to us. When we reach—if we reach it—it will then be decided on what is there revealed, not what we found here to be insufficient. See *Duke v. Sun Oil Co.*, 5 Cir., 1963. F.2d [No. 19,975, June 25, 1963]; *Smoot v. State Farm Mut. Auto. Ins. Co.*, 5 Cir., 1962, 299 F.2d 525, 534; *Gulf Oil Corp. v. Wright*, 5 Cir., 1956, 236 F.2d 46, 53.

Further Proceedings.

The result is that we affirm the judgment in favor of Scott against Delta for the reduced amount. We reverse and remand with directions to enter judgment in behalf of Placid. We affirm the denial of Delta's claim over against Placid and Columbian. We reverse

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[11] As Delta has a potential interest in sharing the burden of the judgment for $75,000 here affirmed against it, it is a proper party for the proceedings on remand and is to be afforded full opportunity for the production of evidence in its own behalf, the examination and cross-examination of witnesses, and participation generally as a party therein. Though indemnity is not available, we express no view on whether Delta might have a right akin to contribution from Columbian.

the allowance of Placid's claim over against Delta because it is superfluous since Placid is exonerated (but affirm it in the event Scott's judgment against Placid is ever reinstated). And finally, we reverse and remand for a limited new trial and other consistent proceedings the claim as between Scott and Columbian as well as Delta's possible claim for contribution, not complete indemnity.[12]

AFFIRMED IN PART AND REVERSED AND REMANDED WITH DIRECTIONS IN PART.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

(Signed) CLARA R. JAMES
Deputy
New Orleans, Louisiana
Jan. 14, 1964

(SEAL)

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[12]As in note 1, supra, the reference to the parties by their correct identity includes all named liability insurers without regard to whether the formal judgments are in the name of the party, the insurer, or either one or both.

APPENDIX A-3

JUDGMENT

United States Court of Appeals
For the Fifth Circuit

October Term, 1962

No. 19,861

Delta Engineering Corporation and The Travelers Insurance Company,

Appellants,

versus

Joseph Ruby Scott, Et Al.,

Appellees.

Columbian Rope Company,

Appellant,

versus

Joseph Ruby Scott,

Appellee.

Indemnity Insurance Company of North America,

Appellant,

versus

Joseph Ruby Scott,

Appellee.

Joseph Ruby Scott,

Appellant,

versus

Delta Engineering Corporation, Et Al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before Cameron and Brown, Circuit Judges, and Whitehurst, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court; and that this cause be, and it is hereby, remanded in part to the said District Court with directions in accordance with said opinion;

It is further ordered and adjudged that the appellant-appellee, Delta Engineering Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 15, 1963

Issued as Mandate:

APPENDIX A-4

In The
United States Court of Appeals
For the Fifth Circuit

No. 19861

Delta Engineering Corporation and The Travelers Insurance Company,
Appellants,

versus

Joseph Ruby Scott, Et Al.,
Appellees.

Columbian Rope Company,
Appellant,

versus

Joseph Ruby Scott,
Appellee.

Indemnity Insurance Company of North America,
Appellant,

versus

Joseph Ruby Scott,
Appellee.

Joseph Ruby Scott,

Appellant,

versus

Delta Engineering Corporation, Et Al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(January 2, 1964.)

On Petitions for Rehearing

Before CAMERON and BROWN, Circuit Judges, and WHITEHURST, District Judge.

PER CURIAM: The several petitions for rehearing are denied. So far as the contention by Delta Engineering Corporation (The Travelers Insurance Company) that payment to the plaintiff Scott of the judgment due by them to him and now affirmed by our opinion will render ineffectual their possible right to recover contribution or the like from Columbian Rope Company, the District Court on remand for the limited retrial shall be free to stay execution on that judgment on such terms and suitable security as required in its discretion to assure ultimate payment of the full amount of the judgment by Delta-Travelers to Scott

with interest and costs. If, to preserve possible rights by Delta-Travelers against Columbian the plaintiff Scott is to be delayed in enjoying the fruits of the judgment heretofore affirmed in his favor, he is entitled to full security and protection.

DENIED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

(Signed) CLARA R. JAMES
Deputy.

New Orleans, Louisiana
Jan. 14, 1964